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Date : 9 December 2011

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Dear Research Director

**RE: CRIMINAL AND OTHER LEGISLATION AMENDMENT BILL 2011 (the Bill) –
PROPOSED AMENDMENTS TO THE RETIREMENT VILLAGES ACT 1999 (the RVA)**

Thank you for your letter of 15 November 2011 and the opportunity to comment.

I **attach** submissions about amendments to the RVA proposed in the Bill (and in the previous *Draft Fair Trading and Other Legislation Amendment Bill 2011*).

I also understand that Queensland Law Society is affirming and repeating, in relation to the Bill, submissions made by it about similar amendments to the RVA proposed in the *Draft Fair Trading and Other Legislation Amendment Bill 2011* (including its previous submissions about the definition and commencement of the "cooling off period").

Yours faithfully

Michael Streeting

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Seasons Greetings

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and re-opens at 8.30am on Tuesday **10 / 1 / 2012**

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**Re *Criminal and Other Legislation Amendment Bill 2011* (the Bill) –
Proposed amendments to *Retirement Villages Act 1999* (the Act)**

Sections		Comments	Submissions
The Bill	The Act		
		<p>Background. It is noted that:</p> <ol style="list-style-type: none"> the previous <i>Consultation Draft Fair Trading and Other Legislation Amendment Bill 2011</i> included various draft amendments to the <i>Retirement Villages Act 1999</i> (the Act) - however the draft Bill was never introduced to Parliament; the <i>Civil Proceedings Bill 2011</i> (passed on 29 November 2011) includes amendments to <i>the exit fee</i> provisions of the Act, the <i>Criminal and Other Legislation Amendment Bill 2011</i> (the Bill) includes other proposed amendments to the Act which were in the draft Bill referred to in item 1 above (other than amendments about the 14 day cooling off period); as submitted consistently by interested stakeholders since the passing of the <i>Retirement Villages Amendment Act 2006</i> (the 2006 Act), amendments about the 14 day cooling off period are needed urgently in the interests of incoming and outgoing residents, and Scheme Operators; <i>these submissions are about items 3 and 4 above.</i> 	
76	28(4)	<p>Registration of Retirement Village Scheme</p> <ol style="list-style-type: none"> The Registrar has power in Section 28(1) to refuse to register an Application. The intention of the proposed amendment is to enable the Registrar to refuse to register a scheme that may technically comply with the minimum requirements of the Act but not the essential purpose of the Act. 	<p>Accordingly it is suggested that Section 28(4) read as follows (with the proposed changes to the Bill provision in bold italics or noted by strike through):</p> <p>(4) However, the chief executive must not <i>may refuse to</i> register a retirement village scheme if the chief executive reasonably considers the scheme is contrary to <i>the Objects and</i> the regulatory framework under of this Act.</p>

		<p>3. The use of the words 'contrary to the regulatory framework' to base the Chief Executive's power is arguably so wide and uncertain as to stifle innovation by Scheme Operators. This is particularly relevant when innovation may / will be required to meet market demands for Villages as the demographic changes.</p> <p>4. Unfortunately if an alternate and more clear phrase/s cannot be found then the Industry will need to be left with this uncertainty until the Chief Executive chooses to use his/her power and an Operator decides to appeal against the refusal.</p> <p>5. Some of the above concerns may be alleviated by using the phrase 'contrary to the Objects and regulatory framework'.</p> <p>6. Use of the obligatory words 'must not register' may unnecessarily expose the chief executive to action or simply be too prescriptive. It may be more appropriate to use the words 'may refuse to register.'</p>	
77	56(1)	<p>Interpretation for Division 5</p> <p>1. Circumstances may arise where a relative (whether meeting eligibility criteria for the retirement village or otherwise) resides without the consent of the unit owner, resident and Scheme Operator, contrary to the terms of the scheme and residence contract.</p> <p>2. Many other anomalous circumstances may arise, depending on events and existing or future relationships.</p> <p>3. It does not seem just or equitable that the trespassing relative have any right of occupancy or pre-emption under section 70B.</p>	<p>Accordingly it is suggested that 70B of the Act be amended as follows (so that the proposed definitions in the Bill for "termination date" in Section 56(1)(b) and (c) of the Act do not have unintended consequences):</p> <p>(a) delete the word 'and" after Section 70B((b), and insert "and" after Section 70B(c); and</p> <p>(b) insert the following new Section 70B(d):</p> <p>"(d) the relative lived in the accommodation unit with the consent in writing of the accommodation unit owner, resident and scheme operator immediately before the residence contract was terminated."</p>
78	91(5)(a)	<p>Capital replacement fund</p> <p>1. The definition of "reinstatement works" in the Dictionary in the Schedule of the Act uses the phrase "replacements or repairs".</p> <p>2. For certainty, the proposed amendment of Section 91(5)(a) should use terminology consistent with that definition.</p> <p>3. Section 91(5) is a Section that essentially defines the primary prohibition in Section 91(3).</p>	<p>Accordingly it is suggested that:</p> <p>(a) Section 91(5)(a) of the Act read as follows (with the proposed changes to the Bill provision in bold italics):</p> <p>"(5)(a) the village's capital improvement, maintenance or repairs, other than replacements or repairs that are reinstatement works the cost of which must be paid out of the fund under section 62(4)";</p>

		<p>4. Consequently the proposed amendment would work as an exception to Section 91(5)'s non exhaustive list of prohibitions to the prescriptive use imposed by Section 91(3).</p> <p>5. In the circumstances it would be prudent to make a corresponding amendment to Section 91(3), so that it is clear that use of the fund for reinstatement works (under prescriptive Section 62(4)) is a primary permitted use of the fund.</p>	<p>(b) delete the word 'or' after Section 91(3)(b), and insert "or" after Section 91(3)(c); and</p> <p>(c) insert the following Section 91(3)(d):</p> <p>"(3)(d) "replacements or repairs that are reinstatement works the cost of which must be paid out of the fund under section 62(4)"</p>
80	106(2)	<p>Increasing charges for general services</p> <p>1. The existing definitions in Section 106(2) of the Act give certainty as they refer to the same corresponding fixed quarters of each financial year.</p> <p>2. The time of publication by the Australian Statistician is arbitrary and dependent on many external factors, and (although perhaps unlikely) could result in reference to non-corresponding quarter/s for any give "year/s" (or part of year/s).</p>	Accordingly it is suggested that the existing definitions in Section 106(2) of the Act remain unchanged
81	237H	<p>Transitional provision</p> <p>It seems intended that amended Section 28(4) of the Act would not apply to schemes registered before commencement of the Bill - and would only apply to schemes not registered before commencement of the Bill (whether their Applications for registration are made before or after that commencement).</p>	
New Section/s 81	44, 45(1) and 45A New 237J	<p>Cooling off period</p> <p>Background</p> <p>1. Immediately before the commencement (on 15 March 2006) of the <i>the 2006 Act</i>, the definition of "cooling-off period" in the Dictionary in the Schedule of the Act was:</p> <p>'cooling off period for a residence contract means a 14 day period starting on the day the contract is made'</p> <p>2. The 2006 Act changed the Act and the law in relation to the cooling-off period by:</p> <p>2.1 amending Section 45(1)(b) and (c);</p>	<p>Accordingly It is submitted in the strongest possible terms that the Bill be amended now to include the following further amendments to the Act:</p> <p>(a) Sections 45(1)(b) and (c) and Section 45A of the Act be omitted;</p> <p>(b) the following Section 45(1)(b) be inserted in the Act:</p> <p>"(1)(b) the date the cooling-off period ends";</p> <p>(c) Sections 45(1)(d) and (p) of the Act be renumbered as 45(1)(c) and (o);</p> <p>(d) in the second line of Section 44 of the Act the word "person" be amended to read "person or the person's lawyer".</p>

	<p>2.2 inserting new Section 45A; and</p> <p>2.3 amending the definition of 'cooling-off period' to read as follows:</p> <p><i>"cooling-off period, for a residence contract, means a 14 day period starting on –</i></p> <p>(a) the day the contract is signed; or</p> <p>(b) if the residence contract is subject to a later event happening or another contract being entered into - the day the later event happens or the other contract is entered into."</p> <p>Concerns</p> <p>3 The above amended definition was not disclosed before introduction of the 2006 Bill on 14 February 2006, was passed on 4 March 2006 without opportunity for consultation or debate, and since then has caused serious problems and concern to Scheme Operators and elderly parties - for example:</p> <p>(a) incoming residents may need their purchase to be subject to contemporaneous settlement of the sale of their existing home (to fund their purchase and to avoid unnecessary removalist, storage and accommodation expenses) – however contemporaneous settlement is no longer possible in such cases because the mandatory 14 cooling-off period commences on the day the ingoing resident's sale is settled;</p>	<p>(e) the existing definition of <i>"cooling-off period"</i> be omitted from the Dictionary in the Schedule of the Act;</p> <p>(f) one of the following definitions of <i>"cooling-off period"</i> be inserted in the Dictionary in the Schedule of the Act:</p> <p><i>"cooling-off period, for a residence contract, means a 14 day period starting on the day the residence contract is made";</i></p> <p>OR (preferably)</p> <p><i>"cooling-off period, for a residence contract, means a 14 day period starting on the day that the person who signs the residence contract with the scheme operator, or the person's lawyer, receives from the scheme operator the single bound document referred to in Section 44."</i></p> <p>(g) the following new Section 237J be inserted in Section 81 of the Bill, after Section 237I:</p> <p>"237J Former Section 45A and the former definition <i>cooling-off period</i> in the schedule continue to apply to a residence contract entered into before the commencement of this section as if the amending Act had not been enacted."</p>
	<p>(b) furthermore, outgoing residents may not be in a position to enter into protracted conditional contracts which are subject to the mandatory 14 day cooling-off period that only commences after the condition is satisfied;</p> <p>(c) most outgoing residents need their exit entitlement (or sale proceeds) to take up immediate occupation in their new accommodation - and in cases where the cooling off period does not start until settlement of the incoming resident's sale, either the incoming or outgoing resident may need to find temporary accommodation until expiration of the 14 day cooling-off period;</p> <p>(d) such restrictions are contrary to normal conveyance practice, stifle commerce and trade in the retirement village industry, and cause distress to elderly buyers and sellers who have difficulty understanding in such cases why they cannot settle and move into their respective new homes immediately the buyer's sale settles (which they could do before the 2006 Act) – this is a serious problem which should be addressed urgently and not ignored;</p> <p>(e) there is no need to collect "anecdotal evidence" – each conditional retirement village conveyance transaction effected or attempted in Queensland, since the passing of the 2006 Act, has been adversely affected (one way or another) by the cooling off provisions and definition introduced by that Act;</p>	

- (f) uncertainty may also arise in a particular case about what is meant by 'a later event happening' or 'another contract being entered into' and lead to litigation.

Suggested amendments

4. The use of the word 'signed' in the current definition to trigger commencement of the cooling-off period is inappropriate and unclear:
- (a) it may mean signed by the resident without any requirement that it also be signed by the Scheme Operator - consequently the period would begin but the operator may not have yet accepted the contract;
- (b) alternatively it may mean signed by resident and Scheme Operator, but without the first signatory necessarily having been informed of signing by the second signatory;
5. A more prudent and practical trigger for commencement of the period would be satisfaction of usual requirements for formation of a contract - namely offer, acceptance and communication of acceptance (ideally by the Scheme Operator's delivery of the "single bound document" under Section 44):
- 5.1 at law (unless under the terms of an application or offer, or by implication, notification of acceptance is not required) formation of a binding contract requires an application or offer by one party and the acceptance of the application or offer, and notification of that acceptance to him/her, by the other party;
- 5.2 in normal circumstances, it is not the acceptance (or signing) of an application, offer or contract by a party which establishes its formation but the communication or notification of that acceptance to the other party;
- 5.3 in some retirement village schemes, the prescribed form of Application/Offer by a person who wishes to acquire a right to reside (for himself or someone else) requires formal acceptance and notification of acceptance (e.g. by the Scheme Operator and owner of the freehold in a lease or loan based scheme, or by the Scheme Operator and primary or resale vendor in the case of a freehold scheme) - by the giving of the single bound document to the person or the person's lawyer under Section 44 (ie those schemes, freehold or otherwise, provide expressly or by implication that the residence contract is "made" when notification of acceptance is given by the act of delivery of the single bound document under Section 44).
- 5.4 in those schemes, by their terms the residence contract is not formed until the single bound document is given by the Scheme Operator under Section 44 – and in those cases it is incongruous to provide that the 14 cooling-off period starts when the residence contract is "signed", before it is in fact formed (according to its terms) by delivery of the single bound document under Section 44;
- 5.5 in the case of freehold schemes, under Section 369 of the *Property Agents and Motor Dealers Act 2000* (PAMDA) the 5 business day cooling-off period for a relevant contract starts on the day the buyer receives a copy of the relevant contract from the Seller (or if received on a day other than a business day, then on the next business day).

It would seem incongruous if:

- the cooling-off period under general residential property legislation (i.e. PAMDA) is expressed to commence when the buyer is given a copy of the relevant contract (which must be interpreted to be a true copy of the signed relevant contract);

		<ul style="list-style-type: none">• but the cooling-off period under the industry specific legislation (i.e. the <i>Retirement Villages Act 1999</i>) is expressed to commence when the residence contract (ie relevant contract) is “signed” (not when the signed contract or a copy of the signed contract is given to the buyer). <p>5.6 The 14 day cooling-off period for a person should not start until the person or his/her lawyer actually receives a signed copy of the single bound document under Section 44 of the Act, so they may properly consider and decide about it within that 14 day period;</p> <p>Otherwise:</p> <p>(a) the 14 day cooling-off period may commence without the person or his/her lawyer:</p> <ul style="list-style-type: none">• having a signed copy of the residence contract for deliberation; and/or• being aware, or even notified, of its signing and/or the date of its signing; and <p>(b) the benefit of Section 44 to the person is seriously diminished if the document required under it is given to the person or his/her lawyer after the commencement or end of the 14 day cooling-off period.</p> <p>6. Elderly purchasers often request and prefer that the Public Information Document, residence contract and related documents be delivered (before and/or after signing) to their lawyer, and it is recommended that Section 44 of the Act be amended for clarity in that regard.</p>
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**Re Criminal and Other Legislation Amendment Bill 2011 (the Bill) –
Proposed amendments to Retirement Villages Act 1999 (the Act)**

Sections		Comments	Submission
The Bill	The Act		
		This submission replaces my submission dated 6 December 2011 made on 9 December 2011 about Clause 80 of the Bill:	
80	106(2)	<p><i>Increasing charges for general services</i> – definition of “<i>CPI percentage increase</i>”</p> <p>It is noted that:</p> <ul style="list-style-type: none"> time of publication by the Australian Statistician is arbitrary and dependent on many external factors, and (although perhaps unlikely) the amendment of the definition proposed in the Bill could result in comparison of the CPI for non-corresponding quarter/s for any given financial year; paragraph (a) of the existing definition clearly refers to the “June quarter”, however paragraph (b) arguably refers to the “March quarter” (ie the quarter <u>ending immediately before the end</u> of a financial year) – which results in comparison of the CPI for the June and March quarters (for a nine month period), rather than comparison of corresponding June quarters for a full financial year; comparison of the corresponding March quarters each year (rather than June quarters) would also facilitate more timely preparation and delivery of annual budgets and financial statement under the Act; and under s 36 of the <i>Acts Interpretation Act 1954</i>, “financial year” in the Act means “a period of 1 year beginning on 1 July” (not being otherwise defined in the RV Act). 	Accordingly it is suggested for clarity and practicality that “31 March” be inserted after “quarter ending” in paragraphs (a) and (b) of the existing definition of “ <i>CPI percentage increase</i> ” in s106(2) (instead of the amendment proposed in the Bill).”